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THE APPROPRIATION OF PAYMENTS.[1]

In this paper we propose to institute some inquiry as to the application of the maxims—*Quicquid solvitur, solvitur in modum solventis*—*Quicquid recipitur, recipitur in modum recipientis.* By way of introduction to our subject, let us, then, investigate generally the nature of a payment.

"*Payment*" denotes the specific performance of an obligation to give a sum of money to another. He to whom the money is owing is called *creditor;* he from whom it is due, *debtor;* and the sum itself, *debt.* The word debt is also used to denote sometimes the debtor's obligation, and sometimes the correlative right of the creditor. According to the above definition, payment presupposes not only a sum of money due, but a sum of money which is either ascertained in amount, or at least capable of being ascertained by a mere arithmetical process. It is obvious that an obligation to pay an unascertained sum cannot be specifically performed at all; until the amount of the money owing be definitely fixed, an obligation to pay cannot be determined by performance,[2] although it may

[1] From the London Law Magazine for August, 1855, p. 21.

[2] However, when the sum is ascertained, it may be treated as if it had previously been so.

be extinguished by release, or by accord and satisfaction, or in some other way. Again, where there is no obligation there can be no payment, but only a gift, loan, &c.[1] Where a right to a sum of money is determined otherwise than by the actual receipt of that sum, there is likewise no payment, in the proper sense of the word. The right may be extinguished in a mode more or less similar to payment, as by accord and satisfaction, where something other than the sum due is accepted in satisfaction of the right to that sum; or by set-off, where the right to a sum of money is extinguished wholly or partially by an obligation to pay another sum of money to the person from whom the first is due; but these modes of extinguishing a right depend upon principles, and are governed by rules materially different from those applicable to payment.

With reference to the subject-matter of the present inquiry, it may be useful, although scarcely necessary, to remind the reader that the position of a creditor is not, juridically speaking, altered by a refusal to accept in satisfaction of his right, something other than that which is due to him, whilst his position is most materially altered by a refusal to accept payment. Such a refusal is, in point of fact, a refusal to allow the debtor to free himself from an obligation by that which, *ex hypothesi*, is a due performance of it. Refusal to accept a partial payment (sometimes called a payment on account,) is, however, obviously very different from a refusal to accept complete payment, and is by no means attended by the same consequences. It is important to remember this. A creditor who has a right to a sum of 1,000*l.* is not, juridically speaking, prejudiced by a refusal to accept 50*l.* at one time, 100*l.* at another, and the residue at another. The creditor is under no obligation to allow his claim to be satisfied piecemeal, as may best suit the convenience of his debtor, and ought not to be and is not prejudiced by refusing so to do.[2] If, however, he does accept a partial payment, his claim is of course extinguished *pro tanto*. Payment, moreover, only presupposes an obligation on the part of the debtor; set-off, on the

[1] A person who pre-pays is never indebted (Smith *vs.* Winter, 21 L. J. C. P. 158); he anticipates his obligation.

[2] See Domat, Lois Civiles iv., tit. 1, § 1, No. 16; and § 4, No. 1.

other hand, presupposes also a counter obligation of like nature on the part of the creditor. Payment is the direct liquidation of a debt due, or treated as due, at the time the payment is made; whilst set-off is the indirect liquidation of a debt by a counter-debt previously or subsequently contracted. Set-off never requires to be more carefully distinguished from payment than when the doctrines relating to the appropriation of payments have to be considered; and especially is it important to bear in mind that payment never creates an obligation, whilst that which gives rise to right to set-off always does.

A payment is said to be "appropriated," or, as continental writers say, "*imputed*," when the obligation of which it is a performance is finally ascertained and settled. If A owes B 100*l*., and no more, and pays B 100*l*., there is no room for doubt—the payment is evidently appropriated as soon as it is made, and the debt is extinguished. The only question which in such a case can arise, is, whether the 100*l*. given by A to B, was a payment, or something else,—*e. g.* a gift or a loan: supposing it to be a payment (and the presumption is that way[1]) there can be no question as to what debt it extinguished. But if A owed B several sums of 100*l*., and made a payment insufficient to liquidate them all, the question would arise, which debt is to be deemed extinguished? and this question is often one of considerable difficulty and importance, as will be obvious by supposing one of the debts to be barred by time, or to be secured, whilst another is unsecured. It is that branch of jurisprudence which determines the mutual rights of debtor and creditor in such cases that we propose to examine.

Those cases[2] in which a person has money in his hands to distribute amongst several claimants, of whom perhaps he is one, do not fall within our province as above determined, although in their discussion the word appropriate is often made use of. They are referred to here, to be excluded hereafter; for if confusion is to be

[1] 1 Tay. Ev. 118; Best on Pres. 176.

[2] Like Williams *vs.* Everett, 14 East, 582; Kilsby *vs.* Williams, 5 B. & A., 815; Greenwood *vs.* Taylor, 14 Sim. 505; which are not cases of *payment* at all. They belong to that branch of jurisprudence which determines the priority of conflicting rights; or, as German writers say, the concurrence of rights.

avoided, and precision to be attained, the subject for investigation must be clearly defined and limited, and must not be departed from and made to include matters which would never have been thought cognate, had it not been for a verbal ambiguity.

We proceed now to examine the mutual rights of debtor and creditor when a payment is about to be or has been made in respect of debts due from the former to the latter.

I.—*In the first place, then, let us inquire as to the Right of the Debtor.*

When a person is indebted to another on various accounts, the former has the option of paying which he likes first, and is at liberty to appropriate any payment he may make to whichever of the debts he chooses. This doctrine is evidently derived from the Roman law. Ulpian says: "*Quoties quis debitor ex pluribus causis unum debitum solvit, est in arbitrio solventis, quod potius debitum voluerit solutum; et quod dixerit, id erit solutum.*"[1] This rule will be found laid down and acted upon in the cases cited hereafter, and was firmly established in the reign of Elizabeth, as appears from *Anon.* Cro. El. 68, where it was held that, *in spite of the creditor*, a debtor was entitled to have a payment made by him appropriated to the account upon which he expressly made it.[2] The reason for this rule is variously given: Ulpian says:[3]—*Possumus enim certam legem dicere ei quod solvimus.*" Other writers refer it to the fact that the money actually transferred belongs to the debtor, who can part with what is his own on his own terms, or not at all. It has already been observed, that were the rule otherwise, the law would lend its assistance to the prevention, on the part of the creditor, of the due performance of the obligation to which the debtor is subject; and this is, perhaps, as satisfactory a reason as any.

The rule in question is not, however, one which obtains under all circumstances and at all times: for, first, it does not necessarily apply unless the payment is sufficient completely to extinguish the

[1] Dig. xlvi. tit. 3, de Solut. l. 1.

[2] See, too, Bois *vs.* Cranfield, Style, 239; Chase *vs.* Box, Freem. 261.

[3] Dig. ubi sup.

debt on account of which it is made; and, secondly, it applies only where the debtor appropriates the payment at the time he makes it. These limitations of the rule require further development.

1. A creditor is not prejudiced by refusing to accept a partial payment on account of a larger sum due.[1] If, therefore, he does not choose to accept a partial payment on the account upon which the debtor desires to make it, the creditor is in a position either to decline altogether to take the money, or to insist, if he takes it, upon applying it to the account which best suits himself. If a partial payment is accepted without objection, the inference naturally is that the creditor agrees to apply it to the account to which it was expressly or impliedly appropriated by the debtor, and the money must be treated as appropriated accordingly. But if at the time a partial payment is made, the creditor refuses to accept it unless he is allowed to appropriate it to some particular account, the inference, if the money is left with him, is, that the debtor agreed that the money should be appropriated in accordance with the declared will of the creditor. The rule, therefore, so broadly laid down, *Quidquid solvitur, solvitur in modum solventis*, applies only, 1. Where the sum paid equals all that is due on the account on which it is paid; or, 2. Where the sum paid (being less than all that is due on the account on which it is paid) is received by the creditor without objection. In other cases the rule which applies is *Quidquid recipitur, recipitur in modum recipientis.*[2]

2. By the law of this country the period within which a debtor can exercise his right of appropriation is very limited; so limited, that unless exercised at the time of payment his right to appropriate is gone forever. The debtor is not indeed called upon to state expressly upon what account he makes the payment; that may sufficiently appear from other circumstances. But, notwithstanding an opinion to the contrary, reported to have been expressed by Lord Kenyon at *Nisi Prius*,[3] the law appears to be clearly settled that the right of the debtor to appropriate a payment must

[1] Dixon *vs.* Clark, 5 C. B. 365.

[2] See the judgment in Webb *vs.* Weatherly, 1 Bing. N. C. 505; and Muhlenbruch Lehrb. des Pand. R. § 470.

[3] Hammersley *vs.* Knowlys, 2 Esp. 666.

be exercised, if at all, at the time the payment is made, and not afterwards.[1]

This rule may be thought extremely harsh, but it must not be forgotten that in the generality of cases payments on account are not equal to what is owing on any account in particular, and that therefore it more commonly occurs than not that the debtor has no right at any time to insist on an appropriation to which his creditor would not assent. In the majority of cases a contrary rule would be extremely prejudicial to the creditor, as it would deprive him of the opportunity of objecting at the fitting time to receive a payment on the account desired by the debtor. And with regard to payments which are not partial, when it is considered that payment of a sum exactly equal to what is due on any particular account goes far to show an appropriation by the debtor to that account, the rule will by no means be found to be so harsh upon the debtor as at first might be supposed. Whether, however, the rule be thought justifiable or not, the cases already cited and those which will be presently referred to, show that it is acted upon with great strictness by English judges.

II. *We will in the next place speak of the Right of the Creditor.* If the debtor when he makes a payment does not appropriate it to any debt in particular, the laws of England[2] and of most countries, agree in conferring a right of appropriation upon the creditor. The extent of this right as well as the time at which it must be exercised, require to be examined.

1. As regards the time at which the creditor can exercise his right, the Roman law[3] expressly declares that he must make the appropriation at the time of payment: *Permittitur ergo creditor constituere, in quod velit solutum, . . . sed constituere in re præsenti, hoc est statim atque solutum est.* This rule, however,

[1] Manning *vs.* Westerne, 2 Vern. 606; Wilkinson *vs.* Sterne, 9 Mod. 427; Bowes *vs.* Lucas, Andr. 55; Hall *vs.* Wood, 14 East, 243, note *c*; Peters *vs.* Anderson, 5 Taunt. 596; Mayfield *vs.* Wadsley, 3 B. & C. 357.

[2] See Manning *vs.* Westerne, 2 Vern. 607; Hall *vs.* Wood, 14 East, 243, note *c*; Peters *vs.* Anderson, 5 Taunt. 596; Campbell *vs.* Hodgson, Gow. 74.

[3] Dig. xlvi. tit. 3, l. 1.

does not prevail in this country.[1] In the well known case of *Peters* vs. *Anderson*, (5 Taunt. 596,) the creditor was held to have appropriated a general payment by the mode in which he framed his action. In *Simson* vs. *Ingham*, (2 B. & C. 65,) Best, J., thought the creditor had only a reasonable time; but in the latter case of *Philpott* vs. *Jones*, (2 A. & E. 41,) it was expressly decided by Lord Denman and the other judges of the Court of Queen's Bench, that the appropriation of a general payment might be made by the creditor *at any time*, at least at any time before action. This decision has been approved by the Court of Common Pleas.[2] Moreover, no appropriation by the creditor is binding until communicated to the debtor;[3] and, therefore, until such communication has been made, a creditor can change his mind as often as he likes. *Simson* vs. *Ingham*, (2 B. & C. 65,) is the leading authority for this doctrine, and has never been doubted.[4]

Upon the whole, therefore, we conclude that a creditor can exercise his right of appropriation at any time he pleases, but that when once he has, by bringing an action or otherwise, notified to his debtor what appropriation has been made, no different appropriation is allowable.

2. As regards the debt to which the creditor can appropriate a general payment, the Roman law lays down as its fundamental principle, that the creditor must act towards his debtor as he would have the debtor act towards him, if their relative position were reversed;[5] and it is only in cases of comparative indifference to the debtor that the creditor is allowed to make such appropriation as he pleases: *Quoties vero non dicimus id, quod solutum sit, in arbitrio est accipientis, cui potius debito acceptum ferat, dummodo in id constituat solutum, in quod ipse, si deberet, esset soluturus, quoque debito se exoneraturus esset, si deberet . . . . . Æquissimum enim visum est creditorem ita agere rem debitoris, ut suam ageret.*[6]

To what extent this rule was carried is not clear; it could, how-

[1] Quære if it ever did? See the dictum of Tindal, C. J., in Smith *vs.* Wigler, 3 Moore & Sc. 175.

[2] Mills *vs.* Fowkes, 5 Bing. N. C. 455.

[3] Simson *vs.* Ingham, 2 B. & C. 65.

[4] See, too, Grigg *vs.* Cocks, 4 Sim. 438; *ex parte* Johnson, 3 De G. Mc. & G. 218.

[5] Domat iv. 4, § 2.

[6] Dig. xliv. tit. 3, de Solut. l. 1.

ever, only apply where a payment was attempted to be appropriated by the creditor, adversely to the interest of his debtor, and without his knowledge. The rule could not apply if the appropriation were attempted to be made in spite of the wish of the debtor, for, as we have seen, he had the option of making such appropriation as he liked, and the creditor's right could only be exercised *statim atque solutum est;* nor could the rule apply if the debtor, knowing of the appropriation, were silent, for silence under such circumstances, would be deemed consent.

According to the law of our own country, a creditor is by no means bound to make such an appropriation as best suits the convenience of his debtor. The debtor can take care of himself by stating in liquidation of what debt he makes a particular payment; and if he does not either expressly or impliedly exercise this right, the creditor can appropriate a payment to the discharge of whatever debt he pleases;[1] provided, of course, it be owing from the person by or on whose behalf the payment is made. To such an extent is this allowable, that a debt, payment of which cannot be actively enforced, may be liquidated by a creditor in preference to a debt which the creditor could by action be compelled to pay. Thus, if one of two debts be barred by the Statute of Limitations, the creditor is at liberty to appropriate a general payment in liquidation of the barred debt.[2] Moreover, the debts need not be of an equally high nature; whether they are or not is wholly immaterial. In *Peters* vs. *Anderson*, 5 Taunt. 596, and *Chitty* vs. *Naish*, 2 Dow. 511, the creditor was allowed to appropriate a general payment to a simple contract debt in preference to a specialty debt,[3] and as, in both instances, the specialty was the older of the two debts, the same cases are authorities to show that the creditor's

[1] See, in addition to the cases presently referred to, Campbell *vs.* Hodgson, Gow, 74; Morgan *vs.* Jones, 1 Bro. P. C. 32.

[2] Mills *vs.* Fowkes, 5 Bing. N. C. 455; Williams *vs.* Griffiths, 5 M. & W. 300; Nash *vs.* Hodgson, Kay, 650. Such an appropriation cannot, however, be deemed an admission by the debtor that the barred debt is due, and consequently does not take the debt out of the statute. See, too, the case of Philpott *vs.* Jones, 2 A. & E. 41, and *post.*

[3] See, too, Chase *vs.* Cox, Freem. 261; Brazier *vs.* Bryant, 2 Dowl. 477, *contra* Vin. Ab. Paym. M. 9.

right of appropriation is independent of the relative ages of his demands.[1]

The creditor's right prevails even as against a surety: for if a person has two demands against the same debtor, and one of them is secured by a surety, a payment made generally by the principal debtor may be applied by the creditor to the liquidation of the other demand,[2] for which the surety is not liable; and, consequently, the surety may then be sued for the whole of the debt for which he is responsible, less, of course, the excess, if any, of the sum paid, over and above the debt to which the payment has been applied by the creditor. The surety cannot effectually urge that the debtor must be presumed to have performed his obligation to him by paying off the guaranteed debt rather than some other.[3]

In conformity with the rule of the civil law, it was indeed held, in an old case (*Heyward* vs. *Lomax*, 1 Vern. 23,) that a creditor could not appropriate a general payment to the discharge of a debt not bearing interest in preference to a debt on which interest was running, "because it is natural to suppose that a man would rather elect to pay off the money for which interest was to be paid, than the money due on account for which no interest is payable." Notwithstanding this natural supposition, the cases already referred to show conclusively, that the creditor is not called upon to consult his debtor's interest. *Heyward* vs. *Lomax*, moreover, is directly opposed to what was held by the Lord Keeper in *Chase* vs. *Box*, (Freem. 261,)[4] and is in principle also opposed to all the modern cases, in which the creditor's right to appropriate has been upheld.

[1] In Wentworth *vs.* Manning, 2 Eq. Ab. 261, this proposition appears not to have been admitted.

[2] *Ex parte* Whitworth, 2 Mont. Deac. & De G. 164; Kirby *vs.* Duke of Marlborough, 2 M. & S. 18; Plomer *vs.* Long, 1 Stark. 155; Perris *vs.* Roberts, 1 Vern. 34; and Marryatts *vs.* White, 2 Stark. N. P. 101, are not opposed to this. Nor is Parr *vs.* Howlin, 1 Alc. & Nap. 196.

[3] In *ex parte* Whitworth, 2 Mont. Deac. & De G. 164, Sir J. Cross seems to have thought that the doctrines of appropriation applied only as between the debtor and creditor; and that when the interests of other persons were concerned, different principles ought to be resorted to. This view has not, however, been taken by other judges.

[4] See, too, Manning *vs.* Westerne, 2 Vern. 606.

The case of *Heyward* vs. *Lomax*, it is therefore submitted, cannot now be considered as law.

Having thus stated and illustrated the general principle according to which the creditor can make such an appropriation of a general payment as best suits his own convenience, it is necessary to examine the real and apparent exceptions to the rule.

First.—The rule presupposes that the debtor has not himself appropriated the payment.[1] Those cases, therefore, where an actual appropriation by him is presumed or inferred, and where, consequently, a different appropriation by the creditor cannot be allowed, are excluded from the operation of the rule, but are not, properly speaking, exceptions to it. Instances of presumed appropriation are afforded by the cases of *Meggot* vs. *Wilson*, 1 Lord Raym. 286, and *Dawe* vs. *Holdsworth*, Peake, N. P. ca. 64, where Lord Holt, and Lord Kenyon on his authority, held that if two debts are owing by a person, and he could be made bankrupt in respect of one of them, but not in respect of the other, a payment made by him generally is to be deemed to have been made in liquidation of the former, and not of the latter debt. By this, all that is meant appears to be, that there is a presumption of appropriation by the debtor, and that such presumption is not rebutted by proof that there was not, in fact, any *express* appropriation. It must be remembered that in Lord Holt's time, bankruptcy was regarded as little short of a crime, and the presumption alluded to was a presumption in favor of innocence.[2]

The cases of *Meggot* vs. *Mills*, *Heyward* vs. *Lomax*, and some others, certainly show that our judges were formerly much more inclined than now, to protect the debtor from a prejudicial appropriation by his creditor. The lenient doctrine of the civil law was evidently that tacitly adopted in the early stages of our commercial law; but it has as evidently long been disregarded.

Instances where a payment made generally may nevertheless be inferred to have been made on some particular account, and so, in

[1] In cases not falling within the classes next noticed in the text, an intention on the part of the debtor to appropriate his payment, goes for nothing if it is not communicated to the creditor; Manning *vs.* Westerne, 2 Vern. 605.

[2] See the observations of the Court on these two cases, in 5 Taunt. 602.

fact, to have been appropriated by the debtor, may easily be imagined; many such cases are to be found in the books,[1] and from them several secondary rules of considerable importance may be deduced. These rules, however, being founded on inference, are inapplicable where the inference on which they are based is excluded by surrounding circumstances. Moreover, each case turning on its own peculiar facts, it is impossible, after forming groups of cases, to abstract any characters common to all the groups, except these, viz: absence of express appropriation by the debtor, and presence of circumstances which nevertheless justify an inference of appropriation by him. Premising that the cases already referred to show conclusively that from the mere fact that appropriation in one way would be most to the advantage of the debtor, no appropriation in that way is inferred to have been made by him, we proceed to examine those cases in which appropriation by the debtor has been inferred.

1. One of the earliest rules laid down was, that where a principal sum is due, and interest upon it is in arrear, a general payment is to be deemed to have been made in liquidation of the arrears of interest, and not of the principal.[2] As compound interest was not allowed, this inference was evidently to the disadvantage of the debtor. The rule, however, is reasonable, inasmuch as no creditor would think of accepting a sum in part-payment of a principal, until the interest upon it had been liquidated.

2. When the money received by the creditor arises from the sale of a security given for a particular debt, the money is ordinarily to be treated as a payment on account of the same debt.[3]

3. When money is handed over by a debtor to his creditor, such money is inferred to be a payment on account of then existing liquidated debts, and not to be a deposit to secure future debts; and the creditor is not therefore allowed to appropriate such money

[1] See, in addition to the cases cited hereafter, Shaw *vs.* Picton, 4 B. & C. 715; Perris *vs.* Roberts, 2 Vern. 34; Marryatts *vs.* White, 2 Stark. N. P. 101.

[2] Vin. Ab. Paym. M. 4; Haynes *vs.* Harrison, 1 Ch. Ca. 105; Chase *vs.* Box, Freem. 261; Bostock *vs.* Bostock, 8 Mod. 242; Bower *vs.* Marris, Cr. and Ph. 351.

[3] Brett *vs.* Marsh, 1 Vern. 468; Young *vs.* English, 7 Beav. 10. Newmarsh *vs.* Clay, 14 East, 239, was decided upon a similar principle.

except to debts owing to him at the time he received it. The only authority for the latter part of this rule appears to be the case of *Hammersly* vs. *Knowlys*, 2 Esp. 666. The case, as reported, is not very clear; it seems, however, to have been one of banker and customer, and that the latter, being indebted to the former, made a general payment on account, and then became further indebted. The banker, upon the subsequent insolvency of the customer, sued a third person upon accommodation acceptances, which had been given to the banker as a security for the first contracted debt; the defendant insisted that that debt had been paid, whilst the banker contended that he had a right to appropriate the payment, which had been made generally, to the discharge of the subsequently contracted debt. This, however, Lord Kenyon would not allow, on the ground that it would be too much to say that a payment made generally was not a payment, but a deposit.[1] Upon a similar principle, a payment made generally was held to be applicable only to a debt ascertained in amount, and not to a debt the amount of which was wholly uncertain, and could only be determined by taking a partnership account.[2] Both these cases are founded upon the rule that money received by a debtor from his creditor is *primâ facie* a payment in the proper sense of that word.

Here it may be as well to direct attention to a distinction between the appropriation of a payment and the appropriation of a security or its proceeds. It has just been seen that the creditor cannot convert a payment of an existing debt into a security for a future debt, and cannot therefore appropriate a payment, although made generally, to a debt contracted after the payment was made. But it has been held that, on the bankruptcy of a debtor, his creditor can apply any general securities in his hands, or the proceeds of such securities, in whatever manner best suits his own purpose, and even to claims which have arisen after the securities were given. This doctrine was settled by Lord Eldon, in *ex parte Hunter*, 6 Ves. 94;[3] and was acted upon in the late case of *ex parte Johnson*, 3 De

[1] It must not be concealed that there was here only a single current account, in which the debt in dispute appeared as an early item.

[2] Goddart *vs.* Hodges, 1 Cr. & M. 33.

[3] See, too, 1 Cooke's Bankr. Laws, 4th ed. 120.

G. Mc. & G. 218.) It often enables a creditor to avail himself of a security, by applying it to an unliquidated claim which he could not prove against the bankrupt's estate, and then to prove for a debt, without setting off against it the value of the security. The principle of the cases just cited seems to be satisfactory. On the one hand, the creditor has several claims against the bankrupt; and, on the other hand, the latter has a claim against the creditor in respect of the securities held by him. These cross-claims more or less neutralize each other; the difference between the value of the securities held by the creditor, and the sums owing to him, determines which of the two parties is upon the whole the debtor of the other; and until the balance is struck, *i. e.* until the creditor has been allowed to set off *all* his claims against the value of his securities, he cannot be said to be indebted to the bankrupt's estate. The doctrine arises from the application of the liberal principle, "he who will have equity must do equity," and from the non-application in bankruptcy of the absurdly strict legal rules concerning set-off. The above reasoning is obviously inapplicable to cases of appropriation of *payments*, inasmuch as a payment is in discharge of an obligation on the part of the debtor, and gives him no claim against the creditor; cross-claims do not, in fact, arise.

4. Where a person is indebted in two capacities, *e. g.* on his own account and also as the representative of another, a general payment is, in the absence of evidence to the contrary, inferred to have been made in discharge of the liabilities incurred by the payer himself, and the creditor is not therefore at liberty to appropriate such a payment to the discharge of a liability of the other class. This was settled by the case of *Goddart* vs. *Cox*, 2 Str. 1194. There the debtor was liable—1. For a debt contracted by himself; 2. For a debt contracted by his wife, *dum sola;* 3. For a debt owing by her as executrix. C. J. Lee held that the defendant having paid money to the plaintiff generally on account, the plaintiff was entitled to ascribe such payments either to the first or the second debt, but not to the third. Of course, circumstances may exist which show that the payment was not made in discharge of the private liability of the payer. Thus, in *Thompson* vs. *Brown*,

Moo. & M. 40, a payment made with partnership money to a person who was a creditor both of the firm and of the individual partner making the payment, was naturally imputed to a partnership debt. So in *Bowes* vs. *Lucas*, Andr. 55, a general payment of rent by a person owing rent as executor and also as assignee, was held to have been made by him as executor; the form of the receipts warranting such an inference.[1]

5. Another and most important instance of inferred appropriation by the debtor is afforded by those cases where there is only one single open current account between the debtor and his creditor. In such cases, a payment made generally on account, is, in the absence of evidence to the contrary,[2] deemed to be made in satisfaction of the *earliest items* in the account; and the creditor is consequently not allowed to make any other appropriation, unless he can show some special reason justifying him in so doing. This doctrine was firmly established by Sir William Grant in *Clayton's case*, 1 Mer. 585, which is the leading authority upon the point, and the judgment in which deserves a most careful perusal. *Bodenham* vs. *Purchas*, 2 B. & A. 39, and many other cases, have since been decided upon the same principle.[3] In *Williams* vs. *Rawlinson*, 3 Bing. 71, the doctrine in question was held to apply even to the prejudice of the debtor's surety, who in vain contended that a general payment ought to be appropriated to the debt which he had guaranteed; and in the late important case of *Pennell* vs. *Deffell*, 4 De G. Mc. and G. 372, the rule was further adhered to, although persons for whom the debtor was trustee were thereby deprived of a considerable sum of money. In *Pennell* vs. *Deffell*, *cestuis que trustent* attempted to follow their money into the hands of the bankers of their trustee: the money was traced to the bankers, was found on the credit side of the trustee's account at the bank, and was held, according to the rule in Clayton's case, to have disappeared so far, but so far only, as the payments out by the banker had diminished it after having exhausted all the sums previously paid in. The L. J. Turner, in his judgment says,—"I take it to be

[1] See, too, Sternedale *vs.* Hankinson, 1 Sim. 393.

[2] 4 B. & Ad. 466–467, and see *post.*

[3] See the Synopsis of cases, *post.*

now well settled, that moneys drawn out on a banking account are to be applied to the earlier items on the opposite side of the account. By every payment which he makes, the banker discharges so much of the debt which he first contracted. If that debt arose from trust-moneys paid in by the customer, so much of those trust-moneys is paid off, and unless otherwise invested on account of the trust, falls into the customer's general estate, and is lost to the trust, because it cannot be distinguished from the general estate of which it has become part. If, on the other hand, the earliest debt due from the banker arose from the customer's own moneys paid in by him, that debt is *pro tanto* discharged, and the trust-moneys subsequently paid in remain unaffected. The same principle runs through the whole account: each sum drawn out goes to discharge the earliest debt due from the banker which is remaining unpaid; and thus, when it is ascertained what moneys have been paid in belonging to the trust, it becomes clear to what portion of the balance which remains the trust estate is entitled."

The rule in Clayton's case, it will be observed, obtains only upon the supposition that there is no evidence from the usual course of business or otherwise, to show in discharge of what particular item a payment was made. The rule is by no means one which, like a *presumptio juris et de jure*, is applied rigorously and independently of intention.[1] In the following cases, although there was a single open current account, there was evidence to show in respect of what in particular a general payment was made, and the rule in Clayton's case was consequently not applied. See *Stoveld* vs. *Eade*, 4 Bing. 154; *Taylor* vs. *Kymer*, 3 B. & Ad. 320; *Lysaght* vs. *Walker*, 5 Bli. N. S. 1.

In applying the rule in Clayton's case, the right of a creditor to refuse a partial payment must not be forgotten. If the creditor accepts a partial payment without dissent, he is, as already observed, bound to apply it for the purpose for which it is paid, and whether that purpose be expressed or implied, is immaterial. If, then, there be a single current account between a debtor and his creditor, and a general partial payment be made and accepted without objection,

[1] See 4 B. & Ad. 766–767, Wilson *vs.* Hirst.

the rule in Clayton's case applies, and the creditor cannot afterwards make a different appropriation. But if the creditor refuses to accept a partial payment unless it be applied to the liquidation of some particular debt, and if, after such a refusal, the money is left with him, the inference would be that the debtor acquiesced in making the payment on the account desired, and Clayton's case would not apply. These remarks appeared necessary in order to reconcile the observations of Lord Lyndhurst, in *Pemberton* vs. *Oakes*, 4 Russ. 154, and of Tindal, C. J., in *Smith* vs. *Wigler*, 3 Moore & Scott, 175, with the view above taken of Clayton's case. Both those learned judges observe that the rule laid down by Sir William Grant only applies if there has been no express appropriation by the debtor *or the creditor;* and as we have already seen that the creditor is not bound to make an appropriation within any fixed time, it might have been thought the rule in Clayton's case would scarcely ever be applicable, or that, being founded on an appropriation by the debtor, it ought to obtain in spite of the creditor. Clayton's case and the rule established by it depend, however, upon a presumption: "presumably it is the first sum paid in that is the first drawn out;" in other words, a payment in respect of one entire current account is inferred to have been made by the debtor in liquidation of the earliest items to his debit. But this inference would be rebutted, and the rule would not therefore apply, if at the time when a partial payment was made, the creditor insisted on having it applied to some item in particular.

Such cases as *Pease* vs. *Hirst*, 10 B. & C. 122, and *Henniker* vs. *Wigg*, 4 Q. B. 793, although sometimes referred to as instances where the rule in Clayton's case has not been applied, in truth illustrate a different branch of the law. In each of these two cases the question was, whether a certain security was or not at an end, as it would have been by the rule in Clayton's case, if it had been given in respect of the earliest of several debts. The Court held that the securities were given not for any debt in particular, but generally as continuing securities for any balance which might be due, and that therefore Clayton's case did not apply *so as to extinguish*

the securities. These decisions are evidently foreign to the matter in hand.

6. The last class of cases in which a general payment is inferred to have been made on account of some particular debt, consists of those where a debtor, being in insolvent circumstances, his assignees or trustees make a payment of so much in the pound to every creditor. If a creditor has several demands and receives so much in the pound upon the total amount of his claims, what he receives is considered as paid as much in respect of one debt as of another, and he therefore cannot appropriate the dividend received, to the satisfaction of one debt more than of another, but must apply the whole dividend to all the debts *pro ratâ.*[1] Consequently, also, if one of the debts is secured by a surety, the surety cannot insist upon the whole dividend being applied by the creditor in satisfaction of that debt, nor can the creditor apply the whole dividend to an unsecured debt; the dividend must be apportioned ratably between the two, and the surety is answerable, and answerable only for the amount of the debt guaranteed less the dividend paid in respect of it.[1] The same rule of appropriation *pro ratâ* applies of course where, in the absence of insolvency, it can be gathered from the conduct of the parties that a general payment was intended as a payment on account of each debt. Such was the case of *Perris* vs. *Roberts*, 1 Vern. 34, *aliter*, *Bevis* vs. *Roberts*, 2 Ch. Ca. 83, where two debts had been cast into one account, and a bill of sale given in respect of the amount of both had been realized by the creditor. The Master of the Rolls and the Lord Chancellor both, held that a surety for one of the debts was entitled to have the proceeds of the bill of sale applied ratably to both, and that the creditor had no right as against the surety, to apply the whole proceeds to the discharge of the debt for which he was not responsible. We may, perhaps, be allowed to express a doubt whether the conclusion in this case would not have been different if it had occurred a century or so later. The case furnishes another

[1] See Bardwell *vs.* Lydall, 7 Bing. 489; Raikes *vs.* Todd, 8 A. & E. 846. But arrears of interest are to be discharged before any part of the principal. Bower *vs.* Marris, Cr. & Ph. 351.

example of the influence of the Roman law at the period of the decision.

Secondly.—The extensive right of appropriation which the law confers upon creditors, presupposes the existence of more than one valid debt. We have already seen that the creditor may appropriate a general payment to a debt barred by time; but the statute of James, upon which the cases deciding this doctrine turned has often been declared only to bar the remedy by action or suit, and not to extinguish the right to payment, if there be any other mode of enforcing it. Where, however, one of the so called debts has no juridical existence, where it imposes no obligation on the debtor, and consequently confers no right on the creditor, there the creditor cannot be allowed to apply a general payment to its liquidation;[1] to allow him to do so would be at the same time to admit and deny the existence of one and the same right.

Upon this principle, accordingly, it was held in *Wright* vs. *Laing*, 3 B. & C. 165, that the creditor could not appropriate a general payment to the liquidation of a claim invalid on the ground of usury. So in *Lampbell* vs. *Billericay Union*, 3 Exch. 383, it was held that a creditor could not appropriate a general payment to the liquidation of a demand arising from work done for a corporation, but for which work the corporation could not be called upon to pay, there having been no contract under the corporate seal.[2] These cases have been supposed irreconcilable with *Philpott* vs. *Jones*, 2 A. & E. 41. There, a publican was allowed to appropriate a general payment to the liquidation of a debt owing for spirits sold in smaller quantities than those for which a person is allowed by the Tippling Act to sue. But the Tippling Act merely says, that *no person shall sue for or recover*, either in law or equity, any debt for spirituous liquors, unless the debt is contracted at one time to the amount of twenty shillings or upwards. In this respect the Tippling Act resembles the statute of James for the limitation of actions and suits; both statutes deprive a creditor of active judicial assistance,

[1] *Ex parte* Randleson, 2 Deac. & Ch. 534.

[2] This case is, however, directly opposed to Arnold *vs.* Poole, 4 Man. & Gr. 860, and is one of the many disgraceful modern cases in which corporations have been allowed to take advantage of their own wrong.

but both allow him to assist himself if he can. *Philpotts* vs. *Jones* is clearly, therefore, not an authority for the statement that a person can appropriate to the satisfaction of a juridically non-existing debt, money which has been paid him generally on account. *Crookshank* vs. *Rose*, 5 Car. & P. 19, is another case on the Tippling Act, and is equally open to the above remarks.

As, until recently, an equitable obligation was not recognized at law, it was held in *Birch* vs. *Tebbutt*, 2 Stark. N. P. 74, and by Bayley, B., in *Goddart* vs. *Hodges*, 1 Cr. & M. 33, that a creditor could not be permitted by a Court of law to apply a general payment to the liquidation of a demand purely equitable. Even admitting that these cases were decided by a strictly logical application of the rule in question, the decisions may be regretted as adding to the number of cases in which law and equity conflict. Now, however, that equitable rights and obligations are not ignored at law, a different doctrine will no doubt be established. *Bosanquet* vs. *Wray*, 6 Taunt. 597, which is sometimes thought opposed to the last two cases, fell within the rule of Clayton's case, as the equitable debts formed the earliest items of what the Court held to be a single current account. The marginal note by Taunton has probably led to the opinion noticed, and is certainly calculated to mislead.

James vs. *Child*, 2 Cr. & J. 678, although not falling strictly within the principle now under discussion, seems to be more closely allied to the cases just referred to than to any others. There the Court held that a solicitor having an open unsettled account with his client, had no right to make two bills, putting all the taxable items in one, and all the non-taxable items in the other, and then to apply a general payment to the liquidation of the first bill in order to sue solely on the second. The client had a right to have all the items in one bill, and to refer the whole for taxation.

Thirdly.—The general right of the creditor, which has been examined, is a right to appropriate a payment which the debtor might have appropriated if he had thought proper, but which he did not, in fact, either expressly or impliedly, or by presumption, pay on any account in particular. The creditor's right does not arise unless the debtor had an opportunity to exercise his right;

and, consequently, in *Waller* vs. *Lacy*, 2 Man. & Gr. 54, the Court would not suffer an attorney to appropriate in part satisfaction of his bill a sum of 17*l.* which he had received from a debtor of the defendant, but without his knowledge. Tindal, C. J., there said, "It is not disputed that as regards a payment where the party paying does not appropriate the money, the party receiving it may; for it is the fault of the payer if he omit to exercise the right of appropriation of the sum so paid. But this is not the case of a payment at all, but of a sum of money received without the knowlege of the defendant. Therefore, as the latter never had the power of exercising any election as to the application of this sum, the right of the plaintiff to appropriate it never arose." Upon a similar principle it is held, that the produce of a security must be applied to liquidate the dates for which that security was expressly given, and no others,[1] and they must be liquidated according to their priority; the produce of the security being, in fact, treated as the security itself.[2]

Having now passed in review all the cases of any importance relating to the appropriation of payments as defined at the beginning of this inquiry, it may be useful concisely to recapitulate the principal rules deducible therefrom.

Using the word debt to denote a sum of money owing by one person to another, and the amount of which is either ascertained or ascertainable by mere computation; and using the word payment to denote the transfer of a sum of money by a debtor to his creditor, in complete or partial satisfaction of the latter's claims against him; it appears that by the law of this country:

1. A debtor may pay in full whichever of several debts he likes; and if, when he makes a payment in full, he states on account of what debt he makes it, the payment can be applied to that debt and no other.

2. A creditor has a right to insist upon applying a partial payment to any debt he pleases; but if, when the partial payment is

[1] Subject to the doctrine of tacking.

[2] Brett *vs.* Marsh, 1 Vern. 468; and see Greenwood *vs.* Taylor, 14 Sim. 505; Young *vs.* English, 7 Beav. 10.

made, he accepts it without objection, the payment must be applied to that debt on account of which the debtor made it.

3. A payment which is not, when made, appropriated to any debt in particular, may at any time be applied by the creditor to any debt existing at the time of payment; and no appropriation by him is considered final until communicated to the debtor.

4. In the absence of sufficient reason to the contrary, a payment is inferred to have been, and is to be treated as having been appropriated, when made, to the discharge, in the first instance,—

Of the debt for which the debtor is responsible in his own private capacity;

Of a debt then due, rather than of an unascertained sum claimed by the creditor, or of a debt not then payable;

Of a debt upon which the debtor might then have been made bankrupt;

Of the then arrears of interest;

Of the earliest of several items which together form one entire account;

Of all debts *pro rata* when the payment is a dividend of so much in the pound.

Further, it may be gathered from the decided cases, that the right of the creditor is a right which, if it arises at all, is wholly independent of the will of the debtor, and cannot be considered as a permission or license granted by him; for if it were, it would lead to the absurdity of inferring a tacit license to do that which is most disadvantageous to the person supposed to grant it, and would further lead to a doctrine which is clearly not law,[1] viz: that an appropriation by the creditor of a general payment would be sufficient to take the debt to which the appropriation is made, out of the Statute of Limitations. Nor do the cases warrant the notion that, under certain circumstances, *the law* appropriates a general payment to one debt rather than another; and still less is it true, that the law appropriates such a payment in the way most beneficial to the debtor, or according to the justice and equity of the case. The law, in this country, it is submitted, makes no appropriation

[1] Nash *vs.* Hodgson, Kay, 650.

whatever, and the appropriations said to be made by it are neither more nor less than the appropriations made by the debtor, and evidenced, not indeed by his express words, but by circumstances which leave but little doubt as to what his intention really was.

NOTE.—The following SYNOPSIS OF CASES relative to the appropriation of payments, is submitted as likely to prove useful to the practitioner, and as affording means for attesting the accuracy of some of the propositions and suggestions contained in the foregoing pages:

I.—RIGHT OF THE DEBTOR—

To appropriate in the first instance.

Anon., Cro. El. 68; Bois *vs.* Cranfield, Style, 239; Chase *vs.* Box, Freem. 261.

To appropriate at the time of payment, but not afterwards.

Manning *vs.* Westerne, 2 Vern. 606; Wilkinson *vs.* Sterne, 9 Mod. 427; Bowes *vs.* Lucas, Andr. 55; Hall *vs.* Wood, 14 East, 243, note *c.*; Peters *vs.* Anderson, 5 Taunt. 596; Mayfield *vs.* Wadsley, 3 B. & C. 357.

II.—RIGHT OF THE CREDITOR—

To appropriate a general payment.

Manning *vs.* Westerne, 2 Vern. 607; Hall *vs.* Wood, 14 East, 243, note *c.* Peters *vs.* Anderson, 5 Taunt. 596; Campbell *vs.* Hodgson, Gow, 74; Morgan *vs.* Jones, 1 Bro. Parl. Ca. 32.

To appropriate at any time he likes.

Peters *vs.* Anderson, 5 Taunt. 596; Philpotts *vs.* Jones, 2 A. & E. 41; Mills *vs.* Fowkes, 5 Bing N. C. 455.

To change his mind as often as he likes, until the appropriation is communicated to the debtor.

Simson *vs.* Ingham, 2 B. & C. 65; Grigg *vs.* Cocks, 4 Sim. 438. [And see *Ex parte* Johnson, 3 De G. Mc. & G. 218.]

And to appropriate to any debt he pleases, e. g.

1. To a debt, payment of which cannot be actively enforced, because of—

The Statutes of Limitations.

Mills *vs.* Fowkes, 5 Bing. N. C. 455; Williams *vs.* Griffiths, 5 M. & W. 300; Nash *vs.* Hodgson, Kay, 650.

The Stamp Act.

Biggs *vs* Dwight, 1 Man. & Ry. 308.

The Tippling Act.

Philpotts *vs.* Jones, 2 A. & E. 41; Crookshanks *vs.* Rose, 5 C. & P. 19

2. To a simple contract rather than to a specialty debt.

Peters *vs.* Anderson, 5 Taunt. 596; Chitty *vs.* Naish, 2 Dowl. 511; Chase *vs.* Cox, Freem. 261; Brazier *vs.* Bryant, 2 Dowl. 477. [But see Vin. Ab. Paym. M. 9.]

3. To a new rather than an old debt.

Peters *vs.* Anderson, 5 Taunt. 596; Chitty *vs.* Naish, 2 Dowl. 511 [But see Wentworth *vs.* Manning, 2 Eq. Ab. 261.]

4. To a debt not guaranteed, rather than to one which is.

Ex parte Whitworth, 2 Mont. Deac. & De G. 164; Kirby *vs.* Duke of Marlborough, 2 M. & S. 18; Plomer *vs.* Long, 1 Stark, N. P. 155.

5. To a debt not bearing interest, rather than to one which does.

Chase *vs.* Cox, Freem. 261; Manning *vs.* Westerne, 2 Vern. 606; [Heyward *vs.* Lomax, 1 Vern. 23, *contra.*]

Provided it be a debt of which the law can take notice.

Ex parte Randleson, 2 Deac. & Ch. 534; Wright *vs.* Laing, 3 B. & C. 165; Lampbell *vs.* Billaricay Union, 3 Exch. 283.

[As to Equitable debts, see

Birch *vs.* Tebbutt, 2 Stark. N. P. 74; Goddart *vs.* Hodges, 1 Cr. & M. 33.]

And be existing at the time the payment is made.

Hammersley *vs.* Knowlys, 2 Esp. 666.

And be also then ascertained in amount.

Goddart *vs.* Hodges, 1 Cr. & M. 33.

And provided the debtor had an opportunity of appropriating.

Waller *vs.* Lacy, 2 Man. & Gr. 54; Brett *vs.* Marsh, 1 Vern. 468; Young *vs.* English, 7 Beav. 10.

III.—CASES WHERE NO APPROPRIATION HAVING BEEN EXPRESSLY MADE BY THE DEBTOR, AN APPROPRIATION BY HIM IS INFERRED, UNTIL SOME REASON APPEARS TO THE CONTRARY.

Inferences drawn from the nature of the debts, viz: of appropriation to—

1. Debt on which the debtor could be made bankrupt.

Meggot *vs.* Wilson, 1 Ld. Raym. 286; Dawe *vs.* Holdsworth, Peake, N. P. 64.

2. Arrears of Interest.

Vin. Ab. Paym. M. 4; Haynes *vs.* Harrison, 1 Ch. Ca. 105; Chase *vs.* Box, Freem. 261; Bostock *vs.* Bostock, 8 Mod. 242; O'Bierne *vs.* McMahon, 1 Jones, (Jr. Eq.) 442; Bower *vs.* Marris, Cr. & Ph. 351.

3. Existing debt.

Hammersley *vs.* Knowlys, 2 Esp. 666.

4. Debt owing by the debtor in his own private capacity.
   Goddart *vs.* Cox, 2 Str. 1194.

5. Earliest item of current account.
   Clayton's ca. 1 Mer. 585; Bodenham *vs.* Purchas, 2 B. & A. 39; Simson *vs.* Cook, 1 Bing. 452; Williams *vs.* Rawlinson, 3 Bing. 71; Field *vs.* Carr, 5 Bing. 13; Brooke *vs.* Enderby, 2 Brod. & Bing. 70; Pemberton *vs.* Oakes, 4 Russ. 154; and compare Jones *vs.* Maund, 3 Y. & C. Ex. 154. Copland *vs.* Toulmin, 7 Cl. & Fin. 349; Bank of Scotland *vs.* Christie, 8 Cl. & Fin. 227, 228; Smith *vs.* Wigler, 3 Moo. & Sc. 175; Manning *vs.* Westerne, 2 Vern. 606; *Ex parte* Randleson, 2 Deac. & Ch. 534; Sternedale *vs.* Hankinson, 1 Sim. 393; Pennell *vs.* Deffell, 3 De G. Mc. & G. 372.

Inferences drawn from the mode of payment or circumstances attending it; viz: from—

1. A payment *pro ratâ* of so much in the pound.
   Bardwell *vs.* Lydall, 7 Bing. 489; Martin *vs.* Brecknell, 2 M. & S. 39; Raikes *vs.* Todd, 8 A. & E. 846; Paley *vs.* Field, 12 Ves. 435; Bower *vs.* Marris, Cr. & Ph. 351 [as to interest.]

2. Pressure.
   Shaw *vs.* Picton, 4 B. & C. 715.

3. Substitution for security (see, too, below, No. 7.)
   Newmarsh *vs.* Clay, 14 East, 239.

4. Account stated.
   Perris *vs.* Roberts, 2 Vern. 34.

5. Amount of payment and discount.
   Marryatts *vs.* White, 2 Stark. N. P. 101.

6. Form of receipt.
   Bowes *vs.* Lucas, Andr. 55; Frazer *vs.* Birch, 3 Knapp, 380.

7. Source of money.
   Brett *vs.* Marsh, 1 Vern. 468; Thompson *vs.* Brown, Moo. & M. 40; Stoveld *vs.* Eade, 4 Bing. 154; Young *vs.* English, 7 Beav. 10; Greenwood *vs.* Taylor, 14 Sim. 505.

8. Course of business.
   Brown *vs.* Anderson, 2 Moo. Priv. Counc. 245; Taylor *vs.* Kymer, 3 B. & Ad. 320; Lysaght *vs.* Walker, 5 Bli. N. S. 1.